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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1071

L. E. CARPENTER AND MARGARET CARPENTER,
Petitioners,

vs.

TITLE INSURANCE AND TRUST COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEALS, SECOND APPELLATE DISTRICT, STATE OF CALIFORNIA, AND BRIEF IN SUPPORT THEREOF.

A. L. WIRIN,
Counsel for Petitioners.

INDEX

Subject Index

	Page
Petition for writ of certiorari	1
Summary statement of matter involved	1
Brief in support of petition	5
Opinion of courts below	5
Jurisdiction	5
Statement of the case	7
Specification of errors	7
Summary of argument	7
Argument	8
Conclusion	15

Table of Cases Cited

Ainsa v. *Mercantile Trust Co.*, 174 Cal. 504	11
Atkinson v. *Foote*, 44 Cal. App. 149	11, 12
Blackburn v. *Webb*, 133 Cal. 420	11
California Savings Bank v. *Wheeler*, 216 Cal. 742	14
Carnegie Steel Co. v. *U. S.*, 240 U. S. 156	10, 13
Carpenter v. *Title Insurance and Trust Co.*, 71 A. C. A. 783, 27 A. C. No. 16, p. of Minutes	3, 5
Cleveland P. & A. R. Co. v. *Pensylvania*, 15 Wall. 300	10
Columbus Railway, Power & L. Co. v. *Columbus*, 249 U. S. 399	13
Com. Center Realty Co. v. *Superior Court*, 7 Cal. (2d) 121	12
Crane v. *Hahlo*, 258 U. S. 142	9
Davidson v. *New Orleans*, 96 U. S. 97	7
Detroit United Railway v. *Detroit*, 242 U. S. 238	6
Edwards v. *Kearzey*, 96 U. S. 600	10
Flack v. *Boland*, 11 Cal. (2d) 103	12
Green v. *Biddle*, 8 Wheat. 1	10
Herbert Kraft Co. v. *Bryan*, 140 Cal. 73	11
Honeyman v. *Hanan*, 302 U. S. 375	15
Houston, etc., R. Co. v. *Texas*, 177 U. S. 77	15

Page

Ingraham v. *Hanson*, 297 U. S. 378 14
John Hancock M. L. Ins. Co. v. *Schlosser*, 222 Iowa 447 15
Kentucky R. Tax Cases, 115 U. S. 321 7
Larson v. *State of South Dakota*, 278 U. S. 429 15
McCullough v. *Virginia*, 172 U. S. 102 6
McDonald v. *Smoke Creek Live Stock Co.*, 209 Cal. 231 12
Mayhall v. *Eppinger*, 137 Cal. 5 12
Northwestern University v. *People*, 99 U. S. 323 15
Piqua Branch of Ohio State Bank v. *Knoop*, 16 How. 369 6
Rabbitt v. *Union Indemnity Co.*, 140 Cal. App. 575 14
Rowenkamp v. *Mercantile Commerce Bank & Trust Co.*, 72 F. (2d) 832 15
Savings and Loan Surety v. *Burnett*, 106 Cal. 514 11
Skidmore v. *Tuolumne Co.*, 35 Cal. App. (2d) 525 14
Soper v. *Ridgmoor Country Club*, 275 Mich. 29 15
State, ex rel. Banester v. *Cantley*, 330 Mo. 943 14
Stockwell v. *Barnum*, 7 Cal. App. 413 11
Sun Printing Co. Pub. Assoc. v. *Moore*, 183 U. S. 642 ..... 10, 13
Wells v. *Union Oil Co. of California*, 25 Cal. App. (2d) 165 14
West River Bridge v. *Dix*, 6 How. 507 10

STATUTES CITED

California Code of Civil Procedure:
Section 348 11
Section 725a 2, 4, 8, 9, 12
Section 870 11
Section 1044 12
Section 1858 14
Constitution of the United States, Article 1, Section 10 9
Judicial Code, Section 237b, as amended 6

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PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, SECOND APPELLATE DISTRICT, STATE OF CALIFORNIA, AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Supreme Court of the United States:

Your petitioners respectfully show:

I

Summary Statement of Matter Involved

The petitioners are citizens of the United States and plaintiffs in a suit at law brought in the Superior Court of Los Angeles County, State of California, for damages against respondent for breach of contract obligations as trustee under a deed of trust with respect to the real prop-

erty of petitioners. The suit was based upon the grounds pleaded in the complaint (R. 8-25) that the trustee wilfully failed to perform the express terms of the trust deed. The complaint alleged the trust deed and incorporated it (R. 16). Unknown to petitioners, the beneficiary under the trust deed elected to declare a default under said instrument and gave notice to the trustee (R. 22) and the trustee acting under his powers as such recorded it. Under the terms of the trust deed, the trustee had a mandatory duty to give notice to petitioners (R. 10-11) but the trustee, respondent herein, failed to do this. Petitioners did not have notice of this fact and certain others until several years later. Subsequently the trustee in violation of the terms of the trust deed failed to proceed with the sale of the home of petitioners and failed to give petitioners notice of an attempted rescission and withdrawal of the notice of default by the beneficiary (R. 20) as required under the terms of the trust deed.

Subsequently the beneficiary instituted a foreclosure suit in the Los Angeles Superior Court to foreclose by judicial action the real property of petitioners. This was done although no provision for such suit was provided for in the trust deed and was contrary to its provisions which required the trustee to proceed with the sale after the notice of default was recorded. In said suit the respondent herein was made a party defendant but made no defense. The plaintiff therein was the beneficiary under the trust deed while petitioners were defendants. Petitioners were thus compelled to engage attorneys to defend the action at great expense. As a result of said suit the property was foreclosed under sec. 725 (a) of the California Code of Civil Procedure (for copy of this section see Point Three of Argument in Brief). By said foreclosure relying on said statute, the obligation of the contract in which respondent

was trustee was impaired. The federal questions were raised in the complaint (R. 14-15). In the present suit petitioners claimed damages in the sum of $13,723.46 as a result of the trustee's actions and failure to act and the loss of their home.

The Los Angeles Superior Court sustained a demurrer to petitioners' complaint (R. 31) without leave to amend the complaint and thus deprived petitioners of a trial on the merits. This judgment was appealed from to the District Court of Appeal which rendered an opinion against petitioners (R. 34), *Carpenter* v. *Title Insurance and Trust Co.*, 71 A. C. A. 783. Petitioners petitioned for a rehearing but this was denied (R. 38). This appeal was to the highest court in California as of right. A petition for hearing was directed to the Supreme Court of California, but said Court rendered an Order in its Minutes of January 7, 1946, denying a hearing. The minutes are found in 27 A. C. No. 16, p. 1 of Minutes. The judgment of the District Court of Appeal is the final judgment of right in California.

The principal questions involved on said appeal were that the terms of the trust deed were not carried out by the trustee to plaintiffs' damages, that the Superior Court in sustaining the demurrer was relying on a statute which impaired the obligation of petitioners' contract, that it was denying petitioners due process in not giving effect to the lack of notice to petitioners. These questions materially affected the determination of the appeal (see opinion of the appellate court, R. 34).

II

Reasons Relied On for the Allowance of the Writ

1. The federal questions, of substance and not theretofore determined by this Court, as to the impairment of the obligation of the contract involved and the denial of due

process to petitioners was decided by said Supreme Court of California and the District Court of Appeal of said state in favor of respondent by holding that respondent was not bound by the terms of the trust deed but could rely on a statute of California, sec. 725 (a) Cal. C. C. P., to relieve it of its duties thereunder. The District Court of Appeal and the Supreme Court had the federal questions presented to them and they were raised in the complaint and also in the briefs and petitions.

WHEREFORE petitioners pray that this Court issue a Writ of Certiorari to review the judgment of the District Court of Appeals, Second Appellate District of the State of California.

Respectfully submitted,

A. L. WIRIN,
Counsel for Petitioners.

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A CORPORATION

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I

Opinion of Courts Below

The opinion in the District Court of Appeal (R. 20) entitled *Carpenter* v. *Title Insurance and Trust Company* is reported in 71 A. C. A. 783, and the minutes of the California Supreme Court containing the denial of a hearing to petitioners are contained in 27 A. C. No. 16, p. 1 Minutes (R. 38).

II

Jurisdiction

1. The date of the entry of the order of the Supreme Court of California denying petitioners a hearing is dated January 7, 1946, and the date the remittitur was issued by

the District Court of Appeal is Jan. 9, 1946, this is the final judgment.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Judicial Code sec. 237 b, as amended.

3. The judgment forming the basis of the petition is final both in form and substance and disposes of all elements in the Court below. The judgment is that of the District Court of Appeal of California and its remittitur was issued on January 9, 1946, and is the judgment of the highest state court of right in California.

4. The federal questions were raised in the complaint (R. 14-15) and in the petitions below. Petitioners asserted that the statute enforced against them impaired the obligation of their contract and that they had been denied due process under the 5th and 14th Amendments of the Constitution of the United States.

5. Cases sustaining jurisdiction:

The following cases, among others, sustain the jurisdiction of this Court:

Piqua Branch of Ohio State Bank v. *Knoop*, 16 How. 369;

McCullough v. *Virginia*, 172 U. S. 102, 116, 117;

Detroit United Railway v. *Detroit*, 242 U. S. 238, 249

"When this court is called upon to decide whether state legislation impairs the obligation of a contract, it must determine for itself whether there is a contract, and what its obligation is, as well as whether the obligation has been impaired."

Determination of the existence of due process of law is the final province of the Supreme Court of the United States.

Davidson v. *New Orleans*, 96 U. S. 97;
Kentucky R., Tax Cases, 115 U. S. 321.

III

Statement of the Case

The statement in the preceding petition under I is hereby adopted and made a part of this brief.

IV

Specification of Errors

1. The judgment of the District Court of Appeal, 2nd Appellate District of California, in rendering an opinion against petitioners, the denial of a rehearing by said Court, and the denial of the hearing by the Supreme Court of California, without due process of law as guaranteed by the Fourteenth Amendment of the Constitution of the United States, and impaired the obligation of their contract by giving validity to the California statute sec. 725 (a) Code of Civil Procedure as against their contractual rights under the trust deed.

V

Summary of Argument

Petitioners entered into a trust deed wherein respondent was the trustee and in which respondent obligated itself to carry out the terms thereof namely to give petitioners written notice of any default entered against them and to proceed with the sale after the trustee recorded the notice of default. The trustee was required to act in good faith

but it never notified petitioners that a notice of default had been recorded nor that it later was withdrawn. The trustee failed and refused to proceed with the sale after the notice of default was recorded as required by the terms of the deed of trust. The lower court decided the issues on demurrer and petitioners did not thus have an opportunity to present their case on its merits. The opinion of the court below exhibits dependence on extraneous matter and does not give proper attention to the federal questions raised by petitioners.

Point 1. The State of California may not pass any laws impairing the obligation of a contract.

Point 2. The contract entered into by the parties can not be altered by state law.

Point 3. The trustee's duties were defined in the trust deed itself and it was bound thereby.

Point 4. The obligation of the contract contained in the terms of the deed of trust was impaired by the construction given sec. 725 (a) of the California Code of Civil Procedure as permitting a foreclosure by judicial action when the trustee had already been committed to a different course under the deed of trust and his own actions.

Point 5. The Supreme Court may determine for itself the extent, construction and validity of the contract.

VI

ARGUMENT

The judgment of the District Court of Appeal and the the Supreme Court of California impaired the obligation of the deed of trust in which respondent was trustee and

petitioners were deprived of their property without due process of law. The contractual rights became fixed at the time the trust deed was executed. The trustee did not carry out its duties thereunder but failed and refused to do so. Either through neglect or conspiracy with the beneficiary the trustee never gave notice to petitioners that the beneficiary had declared a default but instead subsequently returned to the beneficiary the trust deed and acted upon a purported rescission and withdrawal of the notice by the beneficiary. The courts below gave a construction to sec. 725(a) Cal. C. C. P. which overrode the contract and determined that the trustee was not required to proceed with the sale as set out in the trust deed; that lack of notice to petitioners was held to be unimportant although it resulted in petitioners losing their home upon which they had expended large sums of money and further caused them great expense in defending the foreclosure action.

Point 1

The State of California may not pass any laws impairing the obligation of a contract.

(a) The United States Constitution in Article 1, sec. 10, forbids any state to pass any law impairing the obligation of contracts.

(b) A contract is defined to be an agreement in which a party undertakes to do or not to do a particular thing and signifies an agreement of two or more minds, upon sufficient consideration.

Gertrude Crane v. *Louis H. Hahlo*, 258 U. S. 142.

Point 2

The contract entered into by the parties cannot be altered by State law.

(a) A Court cannot make a different contract from that which the parties made for themselves.

Carnegie Steel Co. v. *U. S.*, 240 U. S. 156.
Sun Printing Co. Pub. Assoc. v. *Moore*, 183 U. S. 642.

(b) The Constitution intended to prohibit all such laws impairing the obligation of contracts as interpolate some new terms or conditions foreign to the original agreement.

West River Bridge v. *Dix.* 6 How. (47 U. S.) 507.

(c) Any deviation from the terms of a contract by dispensing with performance of any conditions, however minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation.

Green v. *Biddle.*, 8 Wheat. (21 U. S.) 1.
Cleveland P. & A. R. Co. v. *Pennsylvania*, 15 Wall. (82 & U. S.) 300.

(d) The obligation of a contract includes the means of improvement. The ideas of right and remedy are inseparable.

Edwards v. *Kearzey*, 96 U. S. 600.

(e) The relationship of trustee to creator of the trust is a contractual one that cannot be divested by law.

185 La. 894.

Point 3

The Trustee's duties were defined in the Trust Deed itself, and he was bound thereby.

(a) "The rights of a trustee under a Deed of Trust are limited and his powers and obligations are defined by the instrument which creates the trust.

Atkinson v. *Foote*, 44 Cal. App. 149.
Ainsa v. *Mercantile Trust Co.*, 174 Cal. 504.

(b) A trustee is liable for the excess paid to the creditor.

Atkinson v. *Foote*, 44 Cal. App. 149.
Sec. 348 Cal. Code of Civil Procedure.

(c) "In case of default, the creditor and grantor may require the property covered by a Deed of Trust to be sold, and under the terms of the deed it may be the imperative duty of the trustee to sell".

Stockwell v. *Barnum*, 7 Cal. App. 413.
Also,
Herbert Kraft Co. v. *Bryan*, 140 Cal. 73.
Savings and Loan Surety v. *Burnett*, 106 Cal. 514.

(d) The Trustee must proceed with the highest element or good faith to carry out the terms of the trust deed.

Tyler v. *Granger*, 48 Cal. 259.
Cal. Civil Code, Secs. 863, 866, 870.

(e) The Trust Deed contains no provision authorizing trustee to abandon the proceedings for a sale once the notice of default and election to sell has been recorded. Thus the acts of trustee in doing so were unauthorized and it is liable therefor.

Gilbert v. *Penfield*, 124 Cal. 234.
Cal. Civil Code, Sec. B 870.
Blackburn v. *Webb*, 133 Cal. 420.

(f) The Trustee was under the terms of the Trust Deed obligated to carry out its terms strictly and to keep the

trustors informed of any notice filed with them. It is admitted on the state of the record since the question is raised on demurrer that the facts pleaded must be taken as true. The trustee thus is in the embarrassing position of being unfaithful to its promises in the trust deed, and it is not for it to say now that the trustors could not and should not have depended upon the faithful fulfillment of its obligations by contract.

Mayhall v. *Eppinger*, 137 Cal. 5.
McDonald v. *Smoke Creek Live Stock Co.*, 209 Cal. 231.
Flack v. *Boland*, 11 Cal. (2) 103.
Com. Center Realty Co. v. *Superior Court*, 7 Cal. (2) 121.
Atkinson v. *Foote*, 44 Cal. App. 149.

(g) The Trustee is liable without bond on the securities deposited with the State Treasurer of Cal.

Sec. 1044 Cal. C. C. P.

Point 4

The obligation of the contract contained in the terms of the deed of trust was impaired by the construction given Sec. 725(a) of the California Code of Civil Procedure as permitting a foreclosure by judicial action when the trustee had already been committed to a different course under the deed of trust and his own actions.

(a) Sec. 725(a) Cal. C. C. P.:

> "The beneficiary or trustee named in a deed of trust or mortgagee named in a mortgage with power of sale upon real property or any interest therein to secure a debt or other obligation, or if there be a successor or successors in interest of such beneficiary, trustee or mortgagee, then such successor or successors in in-

terest, shall have the right to bring suit to foreclose the same in the manner and subject to the provisions, rights and remedies relating to the foreclosure of a mortgage upon such property, except that real property, when the estate therein is more than a leasehold of two years unexpired term, sold under a decree in an action brought pursuant to this section, may be redeemed from such sale any time within three months after the sale in the manner and upon the terms provided by law for the redemption of real property sold under execution; provided, however, that in any case wherein the property shall be sold for a sum less than the judgment sum, in addition to interest thereon and costs of action and expenses of sale, the period for redemption shall be one year."

(b) The court must give effect to the contract as made by the parties themselves.

Carnegie Steel Co. v. *United States,* 240 U. S. 156.

(c) When the parties have not made provisions for dispensation, the terms of the contract must prevail.

Columbus Railway, Power & L. Co. v. *Columbus,* 249 U. S. 399.

(d) A party who charges himself by contract with an obligation must perform it, with exception not involved here.

Sun Printing & Pub. Asso. v. *Moon,* 183 U. S. 642.

The trustee was obligated to inform petitioners of the recording of the notice of default but failed to do so. Despite this the Court held that the 725(a) set aside the provisions of the Trust Deed and could be invoked for a judicial foreclosure.

(e) "The rules of law are settled that, in a suit on a contract the Court must take the contract of the parties as the parties have written it."

Skidmore v. *Tuolumne Co.*, 35 Cal. App. (2) 525.

(f) "As the parties have made their own contract, they are bound by its terms. The court cannot rewrite the clear terms of a lawful contract."

Wells v. *Union Oil of California*, 25 Cal. App. (2) 165.

(g) Sec. 1858 of the Cal. Code of Civil Procedure provides that in the construction of a contract the office of the judge is simply to ascertain its terms and not to insert or omit from it.

Rabbitt v. *Union Indemnity Co.* 140 Cal. App. 575.

(h) Any unauthorized change in a material respect will destroy the contract.

Calif. Savings Bank v. *Wheeler*, 216 Cal. 742.

(I) When the highest court of California upheld the sustaining of the demurrer it in effect construed the California statute as permitting acts done in contravention of the clear terms of the trust deed itself, and thus impaired the obligation of the contract.

State ex Rel Banester v. *Cantley*, 330 Mo. 943.

Point 5

The Supreme Court may determine for itself the extent, construction and validity of the contract.

(a) The Court should determine the meaning and effect of the contractual terms contained in the trust deed.

Ingraham v. *Hanson*, 297 U. S. 378.

(b) The Court has a duty to do so.

Houston, etc. R. Co. v. *Texas,* 177 U. S. 77.

(c) The Supreme Court can independently construe the state legislation.

Larson v. *State of South Dakota,* 278 U. S. 429;
Northwestern University v. *People,* 99 U. S. 323.

(d) The construction put on the statute by the State Court is not conclusive.

Rowenkamp v. *Mercantile Commerce Bank & Trust Co.,* 72 F. (2) 832.

(e) The question may be brought to the Supreme Court as to the violation of the contract clause.

Honeyman v. *Hanan,* 302 U. S. 375.

(f) Granting a continuance in a foreclosure suit on condition of small payments would impair the obligation of the contract.

Soper v. *Ridgmoor County Club,* 275 Mich. 29;
John Hancock M. L. Ins. Co. v. *Schlosser,* 222 Iowa, 447.

Conclusion

It is therefore respectfully submitted that this case is one calling for the exercise by the Court of its supervising powers to right wrong done petitioners by granting a Writ of Certiorari, and thereafter reversing said decision.

A. L. WIRIN,
Counsel for Petitioner.

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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

ARCHIBALD H. VERNON,
EARL E. JOHNSON,
GILBERT E. HARRIS,
433 South Spring Street, Los Angeles 13, Calif.,
Attorneys for Respondent.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

SUBJECT INDEX.

PAGE

Statement of the case 1

Brief of the argument 2

Argument 3

I.

The judgment herein did not deprive petitioners of their property without due process of law 3

II.

This court is bound by the decisions of the highest court of the state of California as to the validity and construction of the contract involved 4

III.

The obligation of the contract contained in the deed of trust was not impaired by the alternative and additional remedy of enforcement given by Section 725a of the Code of Civil Procedure of the State of California 5

TABLE OF AUTHORITIES CITED.

CASES.

	PAGE
Atlantic Coast Lumber Corporation v. Minshew, 235 U. S. 685, 59 L. Ed. 424	4
Bell etc. Mining Co. v. First Nat'l Bank of Butte, 156 U. S. 470, 39 L. Ed. 497	2
Bernheimer v. Converse, 206 U. S. 516, 51 L. Ed. 1163	6
Commercial Centre Realty Co. v. Superior Court, 7 Cal. (2d) 121	5
Field v. Acres, 9 Cal. (2d) 110, 69 P. (2d) 422	5
Flack v. Boland, 11 Cal. (2d) 103	5
Guaranty Trust Company v. Blodgett, 287 U. S. 509, 77 L. Ed. 463	4, 6
Lincoln v. Superior Court, 2 Cal. (2d) 127	5
Luckenbach S. S. Co. v. United States, 272 U. S. 533, 71 L. Ed. 394	3
McDonald v. Smoke Creek Live Stock Co., 209 Cal. 231	5
New Orleans & Lake Railroad Company v. State of Louisiana, 157 U. S. 219, 39 L. Ed. 679	6
Ohio ex rel. Bryant v. Akron Metropolitan Park District, 281 U. S. 74, 74 L. Ed. 710	3
Scott v. Security Title Ins. and Guar. Co., 9 Cal. (2d) 606, 72 P. (2d) 143	4
Selover, Bates & Co. v. Walsh, 226 U. S. 112, 57 L. Ed. 146	4
Tidal Oil Company v. Flanagan, 263 U. S. 444, 68 L. Ed. 382	4
Washington University v. Finch, 85 U. S. 106, 21 L. Ed. 818	2

STATUTES.

Civil Code, Sec. 2924	2
Civil Code, Sec. 2924b	2
Code of Civil Procedure, Sec. 725a	2, 5, 6

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement of the Case.

The facts of this case are concisely and adequately set forth in the opinion of the District Court of Appeal of the State of California, filed November 9, 1945 [Record, pp. 34, 35].

Petitioners' suit is brought upon the theory that the trustee under the deed of trust in question violated its duty when it failed to proceed with the sale of the trust property, although the beneficiary had abandoned sale proceedings under the power of sale and invoked his alternative remedy of foreclosure by action.

In the first amended complaint [Record, pp. 14, 15], petitioners alleged that the provisions of the California Code relating to the exercise of powers of sale (Sections 2924 and 2924b, Civil Code) are unconstitutional and deprived petitioners of private property without due process of law because said sections do not provide for notice to the trustors, the petitioners herein.

As no sale was made under the provisions of said sections, they are not involved in the instant proceeding, although petitioners' contention is clearly without merit.

Washington University v. Finch, 85 U. S. 106, 21 L. Ed. 818;

Bell Etc. Mining Co. v. First Nat'l Bank of Butte, 156 U. S. 470, 39 L. Ed. 497.

Brief of the Argument.

I.

The judgment herein did not deprive petitioners of their property without due process of law.

II.

This Court is bound by the decisions of the highest Court of the State of California as to the validity and construction of the contract involved.

III.

The obligation of the contract contained in the deed of trust was not impaired by the alternative and additional remedy of enforcement given by Section 725a of the Code of Civil Procedure of the State of California.

ARGUMENT.

I.

The Judgment Herein Did Not Deprive Petitioners of Their Property Without Due Process of Law.

Petitioners, in their specification of errors, contend that the denial of a rehearing by the District Court of Appeal and of a hearing by the Supreme Court of the State of California deprived them of their property without due process of law as guaranteed by the Fourteenth Amendment of the Federal Constitution.

It is well established that the right of appeal or of review is not essential to due process of law where due process was accorded to the litigant in the Court of first instance.

Luckenbach S. S. Co. v. United States, 272 U. S. 533, 71 L. Ed. 394;

Ohio Ex Rel Bryant v. Akron Metropolitan Park District, 281 U. S. 74, 74 L. Ed. 710.

Petitioners were accorded a full hearing in the Court below upon the contentions set forth in the original complaint [Record, pp. 1 to 4], and in the First Amended Complaint [Record, 8 to 24, 31].

The facts were so fully set out that the Court of first instance, applying the well established law of the State of California, determined that the petitioners had not stated and could not state a cause of action against respondent.

Petitioners appealed, as was their right, and the District Court of Appeal affirmed the judgment rendered by the

Court of first instance. They were thus accorded due process of law, and were deprived of no constitutional right or guarantee by reason of the denial of a rehearing by the District Court of Appeal and a denial of a hearing by the Supreme Court of the State of California.

II.

This Court Is Bound by the Decisions of the Highest Court of the State of California as to the Validity and Construction of the Contract Involved.

The deed of trust in question was a contract made by residents of the State of California, affecting real estate situated in the State of California and to be performed in the State of California. It is well established that this Court has no jurisdiction to review the decision of the highest Court of the State on the question of the validity or construction of a contract.

Selover, Bates & Co. v. Walsh, 226 U. S. 112, 57 L. Ed. 146;

Atlantic Coast Lumber Corporation v. Minshew, 235 U. S. 685, 59 L. Ed. 424;

Tidal Oil Company v. Flanagan, 263 U. S. 444, 68 L. Ed. 382;

Guaranty Trust Company v. Blodgett, 287 U. S. 509, 77 L. Ed. 463.

Petitioners, the trustors under the deed of trust, have no right to control or direct the enforcement of the deed of trust by the owner of the obligation secured.

Scott v. Security Title Insurance and Guarantee Co., 9 Cal. (2d) 606, 72 Pac. (2d) 143.

The trustee is not an interested party in a foreclosure action brought by the beneficiary to foreclose a deed of trust, and has no interest in such action.

Field v. Acres, 9 Cal. (2d) 110, 69 Pac. (2d) 422.

III.

The Obligation of the Contract Contained in the Deed of Trust Was Not Impaired by the Alternative and Additional Remedy of Enforcement Given by Section 725a of the Code of Civil Procedure of the State of California.

That the right to foreclose a deed of trust as a mortgage, given by Section 725a of the Code of Civil Procedure of the State of California, did not alter the contract, but merely afforded a new and additional means of enforcing an existing right, and hence is not unconstitutional as to deeds of trust antedating its adoption, was held by the Supreme Court of the State of California in *Lincoln v. Superior Court,* 2 Cal. (2d) 127.

The doctrine of election of remedies does not apply to the remedies for the foreclosure of a deed of trust as the remedies of foreclosure by trustee's sale under the power of sale therein and foreclosure by action as a mortgage are not inconsistent, but are alternative, cumulative remedies for the enforcement of the contract.

Flack v. Boland, 11 Cal. (2d) 103;

McDonald v. Smoke Creek Live Stock Co., 209 Cal. 231;

Commercial Centre Realty Co. v. Superior Court, 7 Cal. (2d) 121.

That an additional remedy for the enforcement of an obligation does not impair the obligation of the contract and is not unconstitutional, has been repeatedly held by this Court.

Bernheimer v. Converse, 206 U. S. 516, 51 L. Ed. 1163;

New Orleans & Lake Railroad Company v. State of Louisiana, 157 U. S. 219, 39 L. Ed. 679;

Guaranty Trust Company v. Blodgett, 287 U. S. 509, 77 L. Ed. 463.

Petitioners' contract right under the deed of trust was to have the real estate conveyed to the trustee reconveyed to them when they had satisfied the obligation secured by the deed of trust. Section 725a does not affect or impair this right.

Respondent submits that no federal question of substance is presented by the petition herein, and that such petition should be denied.

Respectfully submitted,

ARCHIBALD H. VERNON,
EARL E. JOHNSON,
GILBERT E. HARRIS,
By ARCHIBALD H. VERNON,
Attorneys for Respondent.